

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

STEPHEN THOMAS CAHILL,

Defendant and Appellant.

F071407

(Super. Ct. No. F13906055)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Fresno County. James A. Kelley, Judge.

Caitlin Christian, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Lewis A. Martinez and Louis M. Vasquez, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

* Before Levy, Acting P.J., Poochigian, J. and Franson, J.

Stephen Cahill appeals from the denial of his petition for resentencing under Penal Code section 1170.18 seeking modification of the sentence imposed on his prior conviction for unlawfully driving or taking a vehicle (Veh. Code, § 10851). Cahill contends his conviction under Vehicle Code section 10851 is eligible for resentencing under Proposition 47¹ and that the denial of his request violates principles of equal protection. For the reasons set forth below, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND²

On April 23, 2014, Cahill pled no contest to unlawful driving or taking of a vehicle in violation of Vehicle Code section 10851, subdivision (a). He admitted a strike prior and three prison priors. In exchange for his plea, a charge of receiving a stolen motor vehicle (Pen. Code, § 496d, subd. (a)) was dismissed. Cahill was sentenced to prison for four years, double the middle term due to the prior strike.³

Cahill's arrest took place on June 4, 2013, when he was stopped by police while driving a vehicle reported stolen approximately two weeks earlier. The vehicle belonged to Serina R., who reported that she had parked her car in a Target parking lot to carpool to work and when she returned her car was gone. Cahill stated he had gotten the vehicle from a friend, whom he did not identify, but he assumed the vehicle was probably stolen.

¹ We deny as unnecessary Cahill's request for, inter alia, judicial notice of the Proposition 47 ballot pamphlet filed October 26, 2015.

² Because there was no jury trial, the statement of facts has been compiled from the report of the probation officer.

³ Cahill was initially sentenced in conjunction with another conviction involving a residential burglary. The sentence on the burglary was used as the principle term and Cahill was sentenced to one year, four months on the instant case. Pursuant to a Proposition 47 request not at issue here, his burglary conviction was reduced to a misdemeanor. Cahill was then resentenced for the instant conviction to a four-year term.

On November 17, 2014, Cahill petitioned for resentencing under Proposition 47. (Pen. Code, § 1170.18) On March 4, 2015, the trial court denied Cahill’s petition. This appeal followed.

DISCUSSION

Cahill argues that, on its face, a violation of Vehicle Code section 10851 is a theft offense subject to resentencing under Penal Code section 1170.18. He further argues that treating a conviction for theft of an automobile under Vehicle Code section 10851 as a felony while other similar property thefts are treated as misdemeanors under Penal Code section 490.2 violates equal protection principles. We have previously addressed both issues in *People v. Saucedo* (2016) 3 Cal.App.5th 635 (*Saucedo*), review granted November 30, 2016, S237975.⁴ In *Saucedo*, we held that Vehicle Code section 10851 is not affected by the changes enacted through Proposition 47 and that no equal protection violation arises from the different potential punishments for, or the failure to grant retroactive sentencing relied to, those convicted under Vehicle Code section 10851. (*Saucedo, supra*, at pp. 644-650.) We see no reason to depart from those rulings here. Because Vehicle Code section 10851 is not by its nature a theft offense, its exclusion from Proposition 47 confirms there was no intent to modify the punishment scheme separately set forth for the crime of unlawfully driving or taking a vehicle.

Related to these arguments, Cahill also contends that a conviction under Vehicle Code section 10851 must be eligible for resentencing because it is a lesser included offense to grand theft auto, which is eligible for resentencing when the value of the vehicle is less than \$950. We do not agree. As explained in *Saucedo*, a conviction under Vehicle Code section 10851 does not require an explicit determination of intent to steal.

⁴ Effective July 1, 2016, California Rules of Court, rule 8.1115(e)(1) was amended to provide that a published opinion of a Court of Appeal has no binding or precedential effect once the matter is pending review in the Supreme Court and “may be cited for potentially persuasive value only.”

(*Sauceda, supra*, 3 Cal.App.5th at pp. 644, 645.) Thus, evidence of theft is unnecessary to satisfy the elements needed for conviction. The fact that, in some limited circumstances, Vehicle Code section 10851 can serve as a lesser included offense to theft of an automobile (whether grand or petty theft under Proposition 47), does not change the fact that the ultimate conviction is not necessarily a theft offense. Because Vehicle Code section 10851 is not by its nature a theft offense, its exclusion from Proposition 47 confirms there was no intent to modify the punishment scheme separately set forth for the crime of unlawfully driving or taking a vehicle.

In any event, Cahill has presented no evidence to the trial court on the value of the vehicle. (*People v. Johnson* (2016) 1 Cal.App.5th 953, 962-964.) The initial burden of proof is upon Cahill to demonstrate he is eligible for relief. (*People v. Sherow* (2015) 239 Cal.App.4th 875, 880 [“We think it is entirely appropriate to allocate the initial burden of proof to the petitioner to establish the facts upon which his or her eligibility is based.”]; *People v. Rivas-Colon* (2015) 241 Cal.App.4th 444, 449 [burden on petitioner to show value of stolen property was less than \$950].) This he failed to do.

DISPOSITION

The judgment is affirmed.